

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY
REHABILITATION REVIEW PANEL

In the Matter of the
QRC Registration
of Cherie Jackson,
QRC #371

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson at 9:30 a.m. on Thursday, September 16, 1993 at the Office of Administrative Hearings, 100 Washington Square Building, Minneapolis, Minnesota. The record closed on October 12, 1993, the date of receipt of the last post-hearing submission.

Rory H. Foley, Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155-4199, appeared on behalf of the Minnesota Department of Labor and Industry, Rehabilitation Review Panel. Lawrence E. Meuwissen, from the firm of Weinblatt & Davis, Attorneys at Law, Suite 1616, Pioneer Building, 336 Robert Street, St. Paul, Minnesota 55101, appeared on behalf of the Appellant, Cherie Jackson.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Rehabilitation Review Panel shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Panel. Exceptions to this Report, if any, shall be filed with Joseph Sweere, Chair, Rehabilitation Review Panel, 443 Lafayette Road, St. Paul, Minnesota 55155.

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether the non-renewal of the Appellant's registration as a qualified rehabilitation consultant by the Department of Labor and Industry should be affirmed due to the Appellant's failure to comply with the requirements of Minn. Rule 5220.1400.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Cherie Jackson, the Appellant herein, is an African-American female who has been registered as a qualified rehabilitation consultant with the Department of Labor and Industry since 1980, the first year that registration was mandated.

2. In 1986, the Department of Labor and Industry, Workers' Compensation Division, proposed the adoption of rules which set forth criteria for registration as a qualified rehabilitation consultant (QRC). A rule hearing was held on October 28, 1986 and the adopted rules were published in the State Register on June 8, 1987. These rules required that persons who were registered as QRCs on the effective date of the rules must obtain one of three certifications offered by national certifying bodies within two years of the effective date in order to have their registration renewed. The certifications contained in the proposed rules (Minn. Rule 5220.1400) were the Board of Rehabilitation Certification as a certified rehabilitation counselor (CRC) or a certified insurance rehabilitation specialist (CIRS), and the Association of Rehabilitation Nurses as a certified rehabilitation registered nurse (CRRN). The CIRS certification is designed for QRCs who work for or are associated with insurance companies; the CRRN certification is designed for nurse-QRCs; and the CRC is designed for QRCs with a more general background in rehabilitation services.

3. Since the late 1970s, Cherie Jackson has been employed by Control Data Systems, Inc. as an occupational health consultant. In that position, Ms. Jackson has performed the functions of rehabilitation counseling and disability management for the human resources department on a nation-wide basis. Ms. Jackson is not a registered nurse and has only obtained minimal knowledge of the role of insurance in rehabilitation while performing those job functions.

4. in 1986, when the proposed rules were initially heard at a public hearing, the application for CRC certification from the Board of Rehabilitation Certification contained the following language:

I hereby apply for Certification to the Commission on Rehabilitation Counselor Certification and ascribe to the Code of Ethics printed on this Application. I understand that certification depends upon my successfully completing the assessment of competence procedures established by the Commission including submission of all required documents and references and achieving a minimum passing score on the Certification Examination. I also understand that for research and statistical purposes only, data resulting from my participation may be used in an unidentifiable manner.

5. Subsequent to the adoption of the rules in 1987, the Board of Rehabilitation Certification revised its application language to read as follows:

I, the undersigned, hereby apply for Certification as a Rehabilitation Counselor. I understand that the certification process is administered by a private non-profit voluntary organization representing rehabilitation counselors. I further understand that Certification depends upon my successful passage of an examination which assesses my knowledge and my submission of such information as may be required by the Commission on Rehabilitation Counselor Certification (CRCC). I understand that CRCC is the sole judge of my eligibility

for certification and that I have no right to question its discretion in granting or denying certification. If, in the sole exercise of its discretion, CRCC extends certification to me, I agree to abide by the code of Professional Ethics for Rehabilitation counselors, henceforth referred to as the Code, which I have read and understood. I agree and understand that after certification and during the period of time in which my certification is current, that CRCC may choose to revoke my certification or suspend it, or to otherwise discipline me, for any violation of the Code. In the determination of discipline, I agree that the decision to discipline or not to discipline shall be solely within the discretion and prerogative of CRCC. By submission of this application for certification, I specifically waive any right that I may have to seek any external review of any decision, including but not limited to judicial review by CRCC to grant or not to grant, to revoke, suspend or otherwise affect certification, and/or impose discipline and to otherwise enforce its Code. I specifically release CRCC from any claim which I now have or may in the future have against it for any decision which it has made or will make involving my right to certification and my adherence to the Code. I understand that any complaint which may be filed against me will be considered privileged in any defamation action in which I may thereafter bring. I further agree to indemnify and pay CRCC any costs, including attorney fees, which it may incur in the defense of its rights as outlined in this agreement.

6. Because Ms. Jackson needed a national certification to comply with the rules promulgated in 1987, she obtained the CRC certification application due to the fact that she neither had an insurance or nursing background, The CRC application contained the exculpatory provision set forth in the Finding above. Ms. Jackson refused to sign the application for the certification because of the exculpatory provision (waiver of rights) contained in the application. Consequently, she did not receive a CRC certification. Subsequently, the Department of Labor and Industry denied Ms. Jackson's application for a renewal of her QRC registration in June of 1989. However, Ms. Jackson indicated to the Department that the basis for her refusal to get a CRC certification was the broad exculpatory provision contained in the application. Consequently, the Department stayed the decision to deny Ms. Jackson's renewal until something could be worked out.

7. After negotiations between the Department of Labor and Industry, the Department of Human Rights, and the Board of Rehabilitation Certification, the language contained in the CRC application was amended in 1991 to add the following sentence to the exculpatory provision set forth above in Finding 5.

The provisions contained in this application do not preclude an action under State or Federal law nor are applicable to the extent prohibited by State or Federal law.

Other than the addition of this sentence. the exculpatory provision that Ms. Jackson refused to sign in 1989 remained the same.

B. The Department sent the revised language (with the additional sentence) to the Minnesota Department of Human Rights for their opinion on the legality of the language. The director of the enforcement division, Steven Lapinsky, responded to the Department of Labor and Industry as follows:

. . . The newly-added waiver language satisfactorily addresses the Department's concerns. While persons confronted by the entirety of the waiver/indemnification paragraph may have legitimate concerns about its extensive waiver of other rights, the Department takes no position as to the enforceability of this waiver or the advisability of consenting to this release, in general.

9. Based in part on the response from the Minnesota Department of Human Rights, the Department of Labor and Industry informed Ms. Jackson that she would be given another two-year period, until April 1, 1993, to obtain a national certification pursuant to the rule requirements.

10. Ms. Jackson reviewed the CRC application language which contained the additional sentence and made a decision that the language was still offensive and continued to deny her civil rights. Consequently, Ms. Jackson refused to sign the application form and she did not receive a CRC certification. On April 1, 1993, the Minnesota Department of Labor and Industry denied Ms. Jackson's application to renew her CRC registration. Ms. Jackson appealed the denial and this contested case resulted.

11. The sole reason that Ms. Jackson failed to apply for the CRC national certification was the fact that the broad exculpatory provision contained in the application was repugnant to her as it seemed to take away her rights. Although the other two national certification applications (CIRS and CRRN) did not contain the same offensive language, Ms. Jackson did not feel qualified to take those certification exams due to the fact that she had no insurance or nursing background. Ms. Jackson would willingly have taken the CRC exam if she had not had to sign the application form which contained the exculpatory clause. Additionally, Ms. Jackson would have signed the CRC application if the application language had remained the same as it was prior to 1987 (see Finding 4).

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Rehabilitation Review Panel have jurisdiction over this matter pursuant to Minn. Stat. 14.50 and 176.102, subd. 3 (1992). The Panel has complied with all substantive and procedural requirements of law and rule and the Notice of Hearing was proper

in all respects.

2. For the reasons set forth in the Memorandum below, the Administrative Law Judge concludes that Cherie Jackson's application for registration renewal cannot be denied due to her failure to apply for and take the CRC certification examination.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Rehabilitation Review Panel reverse the Commissioner's decision to deny registration to Cherie Jackson.

Dated this 28th day of October, 1993.

PETER C. ERICKSON
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped.

MEMORANDUM

Ms. Cherie Jackson is an African-American female who is also protected against age discrimination by both federal and state law. Ms. Jackson has worked in the field of rehabilitation of injured workers for over 15 years. She has been a registered, qualified rehabilitation consultant (QRC) since 1987. In 1987, the Department adopted Minn. Rule pt. 5220.1400 (1991). All persons registered as QRCs on June 15, 1987 had to obtain a baccalaureate degree and certification from one of two national certifying entities in order to be reregistered as QRCs in Minnesota. There are two national certifying entities, the Board of Rehabilitation Certification, which issues the certified rehabilitation counselor (CRC) and certified insurance rehabilitation specialist (CIRS) credentials and the Association of Rehabilitation Nurses, which issues the certified rehabilitation registered nurse (CRRN) credential. Ex. 1. Because Ms. Jackson is not a nurse and has virtually no experience with insurance matters, the only appropriate, state-recognized certifying body that could provide her with the certification needed to meet the state reregistration requirement is the Board of Rehabilitation Certification.

At the time the Department adopted the QRC licensing rules, the Board of Rehabilitation Certification required an applicant for the CRC examination to subscribe to the language stated in Finding 4, supra. After the rules had been adopted, the Board of Rehabilitation Certification revised its application language to include a total waiver of all procedural and substantive due process rights in both the application process and the retention of a certification, as stated in Finding 5, supra. Ms. Jackson

objected to the required waiver and, after negotiations between the Department

of Labor and Industry and the Board of Rehabilitation Certification, the additional sentence stated in Finding 7, Supra, was added to the waiver. Ms. Jackson still refuses to execute the waiver required by the Board of Rehabilitation Certification. Because of that refusal and because the governing rule requires certification by a national certifying entity, either the Board of Rehabilitation Certification or the Association of Rehabilitation Nurses, the Department has refused to recertify Ms. Jackson as a QRC in Minnesota. Ms. Jackson argues that the State may not require her to execute a waiver to which she is philosophically opposed. The Department apparently contends that the addition of the sentence to the waiver stated in Finding 7, Supra, moots any otherwise legitimate objection. The Department argues that they may then require Ms. Jackson to execute the waiver and be certified by the Board of Rehabilitation Certification in accordance with Minnesota Rules Part 5220.1400 (1991).

For the reasons hereinafter discussed, the Administrative Law Judge concludes that Ms. Jackson is entitled to substantive and procedural due process protections in both the issuance and retention of her national certification under the circumstances of this case. The Department may not condition a grant of a license to engage in a legitimate, regulated employment on the surrender of due process rights. The addition of the sentence to the waiver stated in Finding 7, supra does not remove the vice of the exculpatory language of the waiver. The waiver still imposes legal and monetary obligations on Ms. Jackson, inappropriately, and, at best, is legally unenforceable. The State has articulated no legitimate interest in requiring Ms. Jackson to subscribe to an unenforceable contractual provision.

As an initial issue, it has been suggested that the State may not delegate to an outside agency the certification of individuals to practice a trade or calling in the State of Minnesota. The Administrative Law Judge affirmatively determined in his Report adopting the rules that the State did possess that authority. Report of the Administrative Law Judge, December 18, 1986, LI-87-001-PE; 4-1900-865-1. Judicial decisions also uphold the authority of a State agency to allow a private entity to certify individuals as a condition of State licensure. Application of Hansen, 275 N.W.2d 790, 796-97 (Minn. 1978); Draganosky v. Minnesota Board of Psychology, 367 N.W.2d 521, 525, fn. 3 (Minn. 1985); State ex rel. Ralston v. Turner, 141 Neb. 556,

4 N.W.2d 302 (Neb. 1942). Hence, as this Administrative Law Judge initially determined, delegating a credentialing responsibility to a private certifying agency is legally appropriate. As will be later discussed, however, the approval of the certifying authority of the outside agency did not authorize the Board to adopt the broad exculpatory language contained in the required waiver.

Although the Administrative Law Judge initially approved use of a national certifying entity as a condition of licensure in Minnesota, that use results in state action giving persons affected certain due process rights. The due process provisions of the Fourteenth Amendment to the United States Constitution and the State Constitution apply if actions are taken under color of state law that affect liberty or property interests. *Campbell v. St. Mary's Hospital*, 312 Minn. 379, 252 N.W.2d 581 (Minn. 1977); *Himes v. City of Flint*, 38 Mich. App. 308, 196 N.W.2d 321 (Mich. App. 1972). The ability to practice a licensed profession in the State of Minnesota is a property right protected against State action by the due process clause of both the state and federal constitutions. *State v. Otterholt*, 234 Ia. 1286, 15 N.W.2d 529

(1944); *Gilchrist v. Bierring*, 234 Ia. 899, 14 N.W.2d 724 (1944); *Bird v. State Department-of-Public-Safety*, 375 N.W.2d 36, 43 (Minn. App. 1985). When the State conditions licensure on initial certification by a private certifying body and the subsequent retention of that certification the actions of the private body are state actions for purposes of the due process clauses of both the state and federal constitutions. *Campbell v. St. Mary's Hospital* 312 Minn. 379, 252 N.W.2d 581 (Minn. 1977). The applicant has a recognized property interest in obtaining and retaining the ability to practice her profession in the State of Minnesota. She is, therefore, constitutionally entitled to appropriate due process protections.

The required waiver of rights, except for the last sentence recently added, places absolute discretion for issuing a certification and revoking it in the Board of Rehabilitation Certification without a right of objection or hearing by an applicant. As should be obvious, the unbridled discretion in the Board to grant certification or to remove it without recourse by an applicant violates both substantive and procedural due process. *Central states Theater Corp. v. Sar*, 245 Ia. 1254, 66 N.W.2d 450 (Ia. 1954); *Pierce v. incorporated-Town of La Porte City*, 259 Ia. 1120, 146 N.W.2d 907 (Ia. 1966). Due process rights include, at a minimum, adequate notice and a reasonable opportunity to be heard on the issues involved before an impartial fact-finder. *Bird v. state Department of Public Safety*, 375 N.W.2d 36, 43 (Minn. App. 1985); *State v. Otterholt*, 234 Ia. 1286, 15 N.W.2d 529 (Ia. 1944).

That such due process must be afforded a QRC in the issuance of and retention of certification is recognized explicitly by Minn. Rule pt. 5200.1500 (1991). It would be curious, indeed, for the rule to establish elaborate due process protections for applicants, but allow, as a condition of registration, a private agency to require an applicant to waive all of those rights .

The Administrative Law Judge, therefore, concludes that the language of the waiver, absent the last sentence, constitutes state action which impermissibly requires an applicant to waive all due process rights in the issuance of a certification and in its retention. For a variety of reasons, The Administrative Law Judge also concludes that the waiver is not enforceable as being against public policy.

There are three principal reasons why the Administrative Law Judge believes that the exculpatory language required by the National Board of Rehabilitation Certification is unenforceable as being against public policy: it results in a rule which is fundamentally different than the rule approved; it is an unenforceable contract of adhesion; and it is an unenforceable exculpatory provision. At the time that the Administrative Law Judge approved the rule in question, the certification required by the Board of Rehabilitation

Certification was as stated in Finding 4, supra. The Administrative Law Judge, in his Report, allowed the certifying entity to promulgate and enforce licensing standards and standards of professional competence. The judicial decisions relied upon by the Administrative Law Judge explicitly state that a governmental entity can rely on a national certifying body to set standards of professional competence. see, Application of Hansen, supra; Dragarky v. Minnesota Board-of Psychology, supra. By adopting the board exculpatory language stated at Finding 5, supra, the Board of Rehabilitation Certification, however, engaged in state action which resulted in a rule that is fundamentally different and has no rational relationship to a licensing standard. The

provision is strictly and entirely a limitation on the Board's own liability and a required waiver of substantive and procedural rights by an applicants As such, it does not set a licensing standard and, in fact, conflicts with Minn. Rule 5220.1500 (1991). The Administrative Law Judge believes, therefore, that it results in a rule which is fundamentally different than the rule approved and should not be enforced. Cable Communications Board v. Norwest Cable, 356 N.W.2d 658, 667-68 (Minn. 1984); SA-AG Inc. v. Minnesota Department of Transportation 447 N.W.2d 1, 4-5 (Minn. App. 1989).

The second reason the Administrative Law Judge believes that the broad exculpatory language required is not enforceable is that it represents a prohibited contract of adhesion. An adhesion contract is drafted unilaterally and enforced upon an unwilling and unknowing individual for necessary services that cannot be obtained elsewhere. Schlobohm v. Spa Petite--Inc., 326 N.W.2d 920, 924 (Minn. 1982); Walton v. Fujita Tourist Centers, 380 N.W.2d 198 (Minn. App. 1986). In this case, the conditions for finding an impermissible contract of adhesion exist. There is disparity in bargaining power between the Applicant and the Board of Rehabilitation Certification over the content of the waiver and the agreement also involves a necessary service that cannot be obtained elsewhere. Given the requirements of the rule and Ms. Jackson's experience, certification by the Board of Rehabilitation Certification is the only manner in which she can continue to practice her profession.

Finally, the law also recognizes that an exculpatory clause should not be enforced when there is disparity in bargaining power between the parties and the service being offered or provided is an essential service. Schlobohm v. Spa Petite, Inc., supra; McCarthy Well Co. v. St. Peter Creamery, Inc., 389 N.W.2d 514 (Minn. App. 1986); Solidification, Inc. v. Minter, 305 N.W.2d 871 (Minn. 1981). For the same reasons discussed above, the Administrative Law Judge believes that the essential nature of the certification and the disparity of bargaining power between the Applicant and the Board make the exculpatory provision, apart from the last sentence, unenforceable.

The State apparently argues that the addition of the last sentence to the

exculpatory language, has stated in Finding 7, supra, makes the totality of the language innocuous and not subject to valid objection by Ms. Jackson. The Administrative Law Judge believes that the only effect of the additional sentence is to require Ms. Jackson to undertake a lawsuit to determine the proper extent of her rights under the exculpatory language and to indemnify the Board for any expenses involved in that litigation, even if she is successful. Although the Administrative Law Judge has determined that the language would not be enforceable against Ms. Jackson, it is possible that with respect to some portions of her rights a different tribunal may reach a different decision. All the State can really argue is that the last sentence of the required statement makes all of the preceding language unenforceable. As Minn. Stat. 645.17 (1992), recognizes, the law never intends a result that is absurd, impossible of execution, or unreasonable. To say that the last sentence of the exculpatory language removes the valid objections of Ms. Jackson is to say that the Department has some interest in requiring adherence to a provision which is, at best, unenforceable. The State has articulated no reason why that is the case. Moreover, as the Administrative Law Judge has previously found, even the totality of the exculpatory language places Ms. Jackson's rights in substantial doubt and could subject her to financial liabilities for attempting to protect her rights. The Administrative Law

Judge, therefore, finds that the Board may not condition recertification of Ms. Jackson on her executing the exculpatory provision stated in Findings 5 and 7, supra.

P.C.E.